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NO. 86-6384

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY ROMINE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the propriety of the giving of an alleged "Allen charge" should be reviewed by this Court as the issue was decided below upon an independent and adequate state ground?

II.

Whether the propriety of the instructions at Petitioner's resentencing trial should be reviewed by this Court as this issue was decided below upon an independent and adequate state ground?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Larry Romine, was indicted in June 1982 by the grand jury of Pickens County, Georgia, for the murders of his parents, Avilee Romine and Roy Lee Romine, and for the armed robbery of Avilee Romine. Upon a trial by jury, Petitioner was convicted on all three counts. Petitioner was sentenced to death on both charges of murder and to a consecutive life sentence on the armed robbery charge. A motion for new trial was filed on April 8, 1982, and was denied on August 9, 1982. An extraordinary motion for new trial was filed on August 24, 1982, and denied on September 29, 1982. On appeal to the Supreme Court of Georgia, the state appellate court affirmed Petitioner's convictions and armed robbery sentence but set aside his two death sentences based upon a denial of his motion for a continuance at the sentencing trial in order to introduce

the testimony of Petitioner's grandfather. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983). The state court remanded the case for a new trial on the sentences to be imposed for the murders. Id.

A new sentencing trial was had in the Pickens County Superior Court on August 16-29, 1985. The jury imposed a death sentence for the first count of murder upon finding that "the offense of murder of Avilee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the armed robbery of Avilee Romine." As to the other murder count, the jury imposed a death sentence, finding that "the offense of murder of Roy Lee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the murder of Avilee Romine." Petitioner's death sentences following the sentencing retrial were affirmed on direct appeal. Romine v. State, 256 Ga. 521, ___ S.E.2d ___ (1986).

A review of the facts presented at Petitioner's resentencing trial is necessary for this Court's determination of whether or not this petition should be granted. Thus, a summary of the evidence submitted at the resentencing trial is presented at this time. The crimes occurred March 19, 1981, and were discovered March 20, 1981.

Roy Lee Romine, Appellant's father, was employed as a small machine mechanic at Georgia Tufters in Calhoun, Georgia. (T. 1299-1300). On the day that Roy Lee was killed, he worked from 5:51 a.m. to approximately 5:00 p.m. (T. 1350-51). The company had two insurance policies on Roy Lee providing for double indemnity in the amount of $44,000. (T. 1347). These proceeds have been paid to Roy Lee's estate. (T. 1348). Appellant was not the first named beneficiary of these two policies. Id. Roy Lee also had three policies in a profit sharing plan, one of which had paid $5,289 to the estate, and two other policies in the amounts of $11,532 and $13,573 which had not yet been paid. (T. 1349). Avilee Romine was the first

named beneficiary on these three policies while Appellant was the second beneficiary. Id.

Patsy Blalock was the insurance and claims clerk at Lacy Mills in Fairmount, Georgia, where Avilee Romine, Appellant's mother, had been employed for almost thirty-three years. (T. 1368-69). Avilee had worked thirty-two hours the week in which she had been murdered and was also paid for the preceding weeks' work. (T. 1373). Avilee left work with her paycheck at approximately 3:55 p.m. on the day that she was killed. (T. 1377). $11,000 has been paid to her estate. (T. 1382-83). Roy Lee was the named beneficiary. (T. 1384).

Ruth Jordan worked at Lacy Mills with Avilee, and the two women had been in a carpool together with some others. (T. 1395-96). Avilee would generally leave her car at Watson's store, a location approximately 1 1/4 miles from her house. (T. 1401). On March 19, 1981, the carpool dropped Avilee off at the store between 4:15 and 4:20 p.m. (T. 1402). Avilee got out of the car carrying a shirt, her pocketbook, a newspaper, and a paper bag with a thermos in it. (T. 1403).

The next morning, the carpool stopped at the store to pick Avilee up but she was not there. (T. 1415-16). The two women, Mrs. Jordan and Mary Cawley, waited a bit as Avilee had been experiencing some car trouble. (T. 1415-16). They called the Romine residence once from the store but got no answer. Id. The two women then decided to check the route to the Romine residence and arrived at the house. Id. Mrs. Jordan eventually went to the front door, knocked on it, and it began opening. Id. She was surprised because Avilee had become nervous about burglaries and would lock her front door and keep a chair propped in front of it. (T. 1413-14).

The two women then drove to Appellant's house, which was approximately 1/2 mile from his parents. (T. 1397-98; 1418). There was no answer at Appellant's house at approximately 6:45 a.m. (T. 1418). The two women went to a nearby preacher's house and asked him to check on the Romines while the two women

went on to work. (T. 1419-20). At work that day, Mrs. Jordan's boss told her that the Romines were dead. (T. 1420). The two women left work and went by the house sometime before noon. (T. 1420, 1423). As they talked to a deputy, Appellant and his wife Dianne drove up in Appellant's red car. (T. 1420-21). Appellant seemed to be in a state of shock and said he "couldn't believe it." (T. 1421). Mrs. Jordan saw Appellant later that day at his house, and Appellant stood at a window, when no one else was in the room, and said he did not see how it could happen with his parent's house "so peaceful-looking." (T. 1424, 1427-28). Appellant said he must have been asleep when his mother was killed. (T. 1424-25). Appellant also said that he had seen his father go home about 6:00 p.m. on the date of the murders. Id. Appellant said that he went to work after 6:00 p.m. the night before. (T. 1426).

Harvey Weems lived approximately 1/2 mile from the Romines. (T. 1486-88). He had previously seen Appellant in a red car. (T. 1488). On the day of the murders, he saw Avilee drive home from work at approximately 3:50 p.m. (T. 1490-91). While standing outside at approximately 5:50 p.m., Weems saw Roy Lee Romine go by in his black truck with a jug of milk and a loaf of bread visible on the seat. (T. 1492-93).

R.T. Hightower lived on the other side of the Romines and approximately 1/2 mile from Appellant. (T. 1519, 1524). On the day of the murders, Mr. Hightower was coming home from work when he saw Appellant at the driveway of his parents' house. (T. 1527-28).

Anthony McClure was pastor of the Ludville Church of God in 1981 and had met both Appellant and the Romines through the church. (T. 1554-55, 1557). On the morning of March 20, 1981, he was home with his two children when the two ladies in the carpool with Avilee asked if he knew if anything was wrong at the Romines. (T. 1561). He went to the house twice, the first time in the early morning and saw that the Romines' car and truck were still there. (T. 1562-63). He knocked on the door,

got no answer, and left. Id. He went back at approximately 9:00 or 9:30 a.m. and noticed that the door was open a bit. Id. He went in, took a few steps, and saw Roy Lee lying to the left in the kitchen with what appeared to be a bag of groceries near him. (T. 1564). He could tell from that distance that Roy Lee was dead. Id. He went on through the house to check on Avilee and found her in the first room beyond the kitchen. Id. He could tell that she was dead. Id. He went straight to the phone, called the operator, and waited for police to arrive. Id. The police, the G.B.I., and Ralph Romine (Appellant's grandfather) came. (T. 1565-66). He recalled telling the G.B.I. at the time that he could see no cars at Appellant's house. (T. 1570).

Narendra Patel was employed as the night clerk and manager of the Big Five Motel in Calhoun, Georgia, in March 1981. (T. 1600-1601). The motel was approximately a one hour drive from Appellant's home. Id. Appellant checked in the motel during the early evening on the date of the murders. (T. 1602-1603). As Appellant said there were two people in his party, he was charged the rate for two persons. (T. 1604-1605, 1607).

Boyce Pass was employed at the Davis Chevrolet-Oldsmobile place in Calhoun in March 1981. (T. 1608). Appellant had financed a car from there and for some reason the car had been brought back to the dealership. (T. 1609-1610). While alone at the dealership at lunch one day, a young woman asked him to unlock Appellant's car so she could get something out of it. (T. 1611). As he unlocked the door, she said, "It's under that floormat on the driver's side in the back." Id. With a screwdriver he removed a piece of paneling; as he held up the mat, she retrieved a large white envelope. Id.

Roy Young was Appellant's father-in-law in March 1981. (T. 1626-27). He knew the Romine family through the Ludville Church of God. (T. 1627). On the morning of March 20, 1981, Roy Lee's sister called his home and told him something was

wrong at Appellant's parents'. (T. 1628). He went to Appellant's house. (T. 1628-30). Upon finding no one home, he went to Roy Lee's house and met Appellant's grandfather and preacher McClure coming out of the house. (T. 1630). They told him that the Romines had been stabbed to death. (T. 1631). Roy Young said he would try to find his daughter and Appellant. Id. He met Appellant driving "slower than usual." (T. 1632). He stopped Appellant and told him that his parents had been killed, and Appellant reacted by grabbing his head and crying. (T. 1633). Roy Young identified a photograph of a trash barrel behind his house where Appellant burned marijuana and other items after the funeral. (T. 1638-40). Roy Young also retrieved the billfold of his son-in-law, Tony Johnson, from Appellant's car at the Chevrolet place. (T. 1643-46).

Moselle Eubanks, Appellant's aunt, had tried to call Appellant's mother about 5:00 p.m. on the day of the murders but got no answer. (T. 1679, 1681-82). At 9:15 or 9:20 the next morning, Appellant stopped by and told her he had applied for a job. (T. 1683). He asked her if she had heard from his parents because he had seen both cars under their carport that morning. (T. 1683-84). She told him that she had not and that she had gotten no answer when she tried to call the night before. (T. 1683-85). He seemed nervous and said he had to leave. Id. After Appellant left, she got a phone call from Ginger McIntyre, Appellant's girlfriend. (T. 1685-86). Ginger told her that a Mitchell or Michael Romine and his wife had been stabbed, but Mrs. Eubanks replied that she did not know them. (T. 1686). Ginger said that she was worried about Appellant and that he was supposed to be there and then hung up the phone. About fifteen to twenty minutes later, Appellant returned with his father-in-law and told her that someone had killed his parents. (T. 1687-88).

Tony Johnson was Appellant's brother-in-law in 1981. (T. 1800). Johnson had gotten in late from a job one night in

January, 1981 and was in bed when Appellant stopped by Johnson's trailer and blew the horn of his red Nova about 1:00 a.m. (T. 1800-1801). Johnson explained that it was his practice when coming late at night, as he had that night in January, to lie his keys and wallet on the washing machine which was in the bathroom of his trailer. (T. 1802). Appellant and Johnson had a drink while Appellant asked Johnson for help in getting a job. (T. 1802). After Appellant went to the bathroom, he left. Id. The next day, Johnson found that his billfold, containing at least $800.00 with a deposit slip filled in, was missing. (T. 1803-1804). His father-in-law, Roy Young, later returned his billfold after the murders had occurred. (T. 1804, 1806). The money was missing but everything else, including the deposit slip, was intact. (T. 1805).

Ginger McIntyre first met Appellant around Thanksgiving 1980. (T. 1843, 1847). She and Dianne Romine had become friends. Id. One night, Dianne visited her and asked Ginger to go out with Appellant because Dianne wanted to date someone else. (T. 1849). At first Ginger said no, then agreed as a favor to Dianne. (T. 1850). After her first date with Appellant, she began visiting Appellant more frequently. Around the time Dianne and Appellant moved into their new house beside Appellant's parents, Dianne asked Ginger not to see Appellant anymore. (T. 1851). Ginger agreed and did not see Appellant for about three weeks. Id. Ginger resumed seeing Appellant after learning that Dianne had not stopped seeing someone else. (T. 1852-53).

On the Sunday before the murders occurred on Thursday, Roy Lee came to Appellant's house on a Sunday morning; Ginger's car was out front but she hid from him. Id. She then saw Roy Lee and Appellant standing outside; after they came inside, she overheard Roy Lee tell Appellant that he knew Ginger was in the house and for Appellant to tell her what he had said. (T. 1854). When she later asked Appellant what his father had

said about her, Appellant refused and told her not to worry about it. Id. They fought and she began to leave. (T. 1854-55). He asked her not to leave, but she refused because she knew his father did not want her there. (T. 1854-55). Appellant said, "You don't have to worry about this because this won't go on much longer." (T. 1855). On Wednesday night, Appellant and Ginger stayed at her trailer. (T. 1858). On Thursday, March 19, the day of the murders, Appellant was gone when she woke up but returned after lunch and asked if she could go out that night. (T. 1859). They eventually rented a motel room at the Big Five Motel in Calhoun, Georgia that evening. (T. 1871-73). They left at 9:00 a.m. on Friday morning and went back to Appellant's hometown. (T. 1874-76). As they passed Watson's store, Appellant noticed that his mother's car was not parked there. (T. 1876). Appellant remarked that he thought his father probably had not gone to work that day, either, and that they were looking for him. (T. 1876). Appellant later dropped her off at her mother's house. When she next saw Appellant on Saturday morning, she told him that people were saying he had killed his parents. (T. 1881-82). He replied that he thought people would say that. Id. He told her that only his mother's pocketbook was missing from the house. Id.

Ginger identified state's exhibit number twenty-two as her rifle; she only used purple shells with number eight shot in it and it had been cleaned after she last used it. (T. 1883, 1980, 1892). This was identified as the murder weapon. (T. 2232-34).

Ginger had introduced Appellant and his wife to the practice of injecting ground-up diet pills. (T. 1844, 1986-88). She was familair with Appellant's drug usage and his behavior after using drugs. Id. On the night of March 19, 1981, Appellant did not act any differently or under the influence of any drugs in her opinion. (T. 1903-1904). She and Appellant did not do any drugs on that night. (T. 2031).

Appellant had once told Ginger that his mother indicated she was going to hospitalize him for drugs. (T. 2039). He told Ginger he was not worried about that. Id. On another occasion, as they stood out in the yard of his house, he told her that all of the land in sight belonged to his parents. (T. 2042). He said, "If anything ever happens to them I get all this and $50,000." Id.

Dianne Romine Carter, Appellant's ex-wife at the time of resentencing, testified that she first met him at the Church of God in the late sixties and that they were married in June 1970. (T. 2110-11). They lived in a trailer next to his parents for which his parents had arranged a loan. (T. 2111-12). They initially had a good marriage, were active in the church, sang in a gospel group, and Appellant preached. (T. 2112-13). After six months, little things began creeping into their marriage;Appellant also starting changing jobs, drinking a little and seeing other women. (T. 2113-14). They separated for two and a half years sometime after their first child was born. (T. 2414-15, 2117). In 1976, the couple reunited, but Dianne had mixed feelings about their reunion. (T. 2119-20). Then, Appellant lost his driver's license because of speeding tickets, and she had to work, although she was pregnant at the time. (T. 2121-22). Around Christmas of that year, she found Appellant with another woman. (T. 2122-23). Things eventually got better between the two, however, and they decided to build a house next to his parents in 1980. (T. 2122-24). At this point, she was working in the sheriff's office, and she became friends with Ginger McIntyre. (T. 2124-26). Ginger began visiting her house a lot, and Ginger's interest in Appellant became obvious. (T. 2126). Ginger and Appellant got together in October, so Dianne started seeing Doug Rich in December. (T. 2127). Three or four weeks after she met Ginger, Ginger taught them how to inject the diet pills Dianne had previously been taking for a weight problem. (T. 2131). Dianne eventually tired of their lifestyle and

drugs and asked Appellant for them to straighten out their lives. (T. 2128). Appellant refused and said he was through with her. Id. They got into a fight, and he broke her glasses. Id.

Dianne began living with Doug Rich about two or three weeks before the murders. (T. 2133-34). The morning after the murders had occurred, Ginger pulled up with Appellant in his car, and Ginger got out and asked Dianne if she wanted to get drugs. Id. Dianne said no, so Ginger left. Id. Later, Ginger returned and told Dianne Appellant's parents were dead and that someone had broken in and stabbed them. Id. Ginger drove Dianne to Appellant's aunt's house. (T. 2143). Dianne, her father, and Appellant picked up their child from school, and she then went with Appellant to his parent's house. Id. They eventually returned to their house to wait. (T. 2144). Appellant told her that police would probably search their own house so that they should get rid of some old marijuana. (T. 2146). Dianne stuffed it in some bags and put it in a closet. (T. 2147). Appellant later got the bags, which were apparently stored in one big bag, out of a closet, and they took it to her parents' house where Appellant burned the bag in her father's trash barrel. (T. 2147). Dianne never looked inside this bag. (T. 2148). Dianne and the children visited Appellant at the jail after he had sent word that he wanted to see them. (T. 2150, 2160). He told her that he had wanted to tell her and the kids about the incident and said he never would have done it if he had been in his right mind. (T. 2160). Appellant said he had not been able to sleep until he got it off his chest and that maybe this was God's way of bringing him down. (T. 2161). Appellant told Dianne about a packet of things under the carpet of the driver's side of his car, which Dianne later retrieved and then turned over to the G.B.I. (T. 2161-63). Avilee's payroll check was in the packet of items she retrieved from the car. (T. 2202).

Dr. Byron Dawson testified that Avilee suffered one gunshot wound entering the chest and exiting her back. (T.1934-35). Twelve to fifteen puncture wounds surrounded the wound. (T. 1935). The cause of death was internal loss of blood from lacerations to blood vessels in the lung as a result of a gunshot. (T. 1935-36). Dr. Dawson also testified that Roy Lee suffered a gunshot wound to the back. (T. 1920). The cause of death was internal hemorrhaging from lacerations to the chest organs as a result of a gunshot. (T.1926). Both victims died within a matter of minutes. (T. 1941-44).

State firearms examiner Kelly Fite examined the pellet pattern on Avilee's raincoat and Roy's shirt to determine a muzzle-to-target distance. (T. 2237-2239). He also visited the scene of the crime and observed the pellet pattern in the wall at the Romine residence. (T. 2249). Fite concluded that Avilee was shot from a distance of four feet and Roy was shot from a distance of seventeen feet. (T. 2237-39). He compared the waddings found at the scene with Ginger's shotgun and concluded they were fired from this gun. (T. 2232-34).

Appellant was arrested on March 24, 1981, and subsequently gave authorities a written and signed confession. (T. 2350, 2351-53). A Jackson-Denno hearing was held at the initial trial of this case, where the trial court ruled that the statement was intelligently and voluntarily given. (T. 2243). In the statement, Appellant said he dropped Ginger at her parents' house and then went to her trailer and got her gun. (T. 2351-53). Appellant then went to his parents' house at 3:20 and waited on them. Id. In the interview on March 24, Appellant stated that he shot his parents but that he was on drugs at the time. (T. 2351-53). Prior to the interview, however, Appellant had told another G.B.I. agent that the last drug he had taken was a diet pill three weeks earlier and that he had not smoked marijuana for two months. (T. 2512). Appellant interrupted the interview to ask Sheriff Wofford what they would do to him. (T. 2515-17). Appellant stated that

before he went to his parent's home on March 19, he took two hits of acid. (T. 2351-53). Appellant said that in 1972, his parents had hospitalized him for six months because of drugs. Id. He stated that his parents found out that he was on drugs and planned to send him back to the hospital but he did not want to go. Id.

Following Appellant's arrest Appellant told G.B.I. Agent Stanley Thompson that he had put Avilee's purse in Young's trash barrel. (T.2519; 2529). Investigators recovered the debris from the trash barrel and found a metal tool, a metal frame of a small coin purse, and metal items used in the construction of a purse, such as a triangle shaped frame, metal rings, zipper and zipper handle. (T. 2529-30).

Dr. Shelton Cohen, a psychiatrist, had been retained by Appellant prior to the first trial in this case. (T. 2473-74). Appellant had told him of his upbringing, his employment history, and his drug use. (T. 2475-76). The psychiatrist testified that amphetamines are "super stimulants" which usually will make a user more alert and more active. (T. 2477). The psychiatrist found that Appellant had "very mixed feelings" towards his parents as he respected them but also resented them because of the restrictions that they had placed on him. Id. Although Appellant had obviously kept these feelings in check, his inhibitions somehow dissolved so that he "got into a murderous rage and killed them." (T. 2478).

Stewart Brown worked at a radio shop in Jasper in March, 1981. (T. 2490-91). He sold two radios to Appellant. (T. 2491-92). The signature on the check was that of Roy Lee Romine. Id. When the employee deposited the check a couple of days later, the bank called him and told him to pick it up because of insufficient funds. (T. 2493, 2495).

John Early was a pharmacist to whom Appellant presented a prescription for prelud in on February 20, 1981. (T. 2498). The pharmacist noticed that the handwriting was not that of the

doctor who purportedly signed it. Id. The pharmacist told Appellant that he did not have the drug in stock and to come back after he had ordered it. Id. Upon contacting the doctor and verifying that the doctor did not write the prescription, the pharmacist contacted the area state drug inspector. (T. 2499). Appellant returned a few days later and was given only three pills, pursuant to the drug inspector's instructions. (T. 2500). Charges were later made against Appellant. (T. 2501; 2505).

Appellant presented the testimony of four witnesses in mitigation, including his grandfather, Ralph Romine. (T. 2551; 2560; 2572; 2680). Appellant also testified in his own behalf. (T. 2589). Appellant testified that Ginger was at the house with him and implied that Ginger killed his parents. (T. 2621-24). Appellant stated that he was "messed up" on drugs at the time. Id. Appellant also testified that Dianne had thrown his mother's pocketbook into the fire. (T. 2638). Appellant denied killing his parents. (T. 2639).

The jury found the existence of one statutory aggravating circumstance as to each count of murder and recommended that a death sentence be imposed as to each count. (T. 2932). Following a poll of the jury (T. 2933-40), the trial court sentenced Appellant to death on each murder count. (T. 2940-44).

Further facts will be discussed as necessary in order to more thoroughly address the issues presented in the instant petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. AS THE STATE APPELLATE COURT DECIDED PETITIONER'S CONTENTIONS REGARDING THE GIVING OF AN ALLEGED "ALLEN CHARGE" UPON AN INDEPENDENT AND ADEQUATE STATE GROUND, THIS COURT SHOULD DECLINE TO CONSIDER ANY FEDERAL CONSTITUTIONAL ISSUE.

Petitioner has urged this Court to grant certiorari on the issue of whether or not the trial court's giving of an alleged "Allen[1] charge" violates the Eighth and Fourteenth Amendments. The Supreme Court of Georgia decided this issue upon an independent and adequate state ground and did not reach any federal constitutional claim. The court found it a misnomer to label the supplemental instructions as an "Allen charge" and further held that the supplemental instructions were fair and accurate. Thus, in that the state appellate court decided this issue upon an independent and adequate state ground, this Court should also refuse to reach the merits of any federal constitutional issue. Michigan v. Long, 463 U.S. 1032 (1983); Henry v. Mississippi, 379 U.S. 433 (1965); Herb v. Pitcairn, 324 U.S. 117 (1944).

In the court below, Petitioner initially complained that the trial court erred in refusing to grant a request for mistrial after the foreman announced that the jury was allegedly "deadlocked." The state appellate court noted that a motion for mistrial based upon the length of a jury's deliberation is within the sound discretion of the trial court. Romine v. State, 256 Ga. at 524. The state appellate court further noted that the trial court "is not bound to accept the jury's feeling that it is hopelessly deadlocked."

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[1] Allen v. United States, 164 U.S. 492 (1896).

Romine v. State, 256 Ga. at 524, citing Todd v. State, 243 Ga. 539, 542, 255 S.E.2d 5 (1979).

The state appellate court noted that the thrust of Petitioner's legal argument was that because the States of Florida and Deleware had disapproved the giving of Allen charges, Georgia should follow accordingly. Id. at 524-25. The state appellate court expressly distinguished the Deleware and Florida death penalty statutes and cited long-standing Georgia precedent that "under Georgia law a jury is expected to review the evidence and to endeavor to reach unanimity 'one way or the other' on the question of sentence, and, if possible, to affirmatively and unanimously recommend either death or mercy." Romine v. State, 256 Ga. at 525. The court further noted, "Because either verdict must be unanimous, and because the jury is not informed of the consequences of its inability to reach a verdict as to sentence, instructions to deliberate further simply do not have the effect of suggesting to a Georgia jury that it should return a death sentence." Romine v. State, 256 Ga. at 525. The state court concluded as follows:

> Consistent with our previous cases, we hold as follows: (1) where a jury is unable to agree on a verdict, that disagreement is not itself a verdict; and (2) whether a jury is hopelessly deadlocked is an evaluation we commit to the sound discretion of the trial court, subject to appellate review for an abuse of discretion.

Romine v. State, 256 Ga. at 525.

Further, as a factual matter the state appellate court noted that the trial in this case, including the presentation of evidence, arguments and instructions, "took the better part of seven days." Romine v. State, 256 Ga. at 525. The court noted that "after less than four hours of deliberation" the jury foreman reported a "wide division" and expressed doubt about the possibility of reaching a verdict. Id. The court noted that after three additional hours of deliberation, the

jury foreman expressed more doubt about ability to reach a verdict but noted, however, that the jury had made considerable progress and that the division had narrowed "significantly." Romine v. State, supra. The state appellate court concluded, "Considering the length and complexity of the trial, the length of time the jury deliberated before declaring itself deadlocked, and the amount of progress made in the interim, we find no abuse of discretion in the court's refusal to declare a mistrial." Romine v. State, 256 Ga. at 526.

With regard to the issue of the propriety of giving an "Allen charge", the state appellate court noted that because of the decades of decisions regarding Allen v. United States, supra, it was a misnomer to refer to "a single Allen charge." Romine v. State, 256 Ga. at 526. The court noted that one of the most commonly-made observations of this type of charge was the danger that the jurors in the minority would be admonished to rethink their position in light of the majority's views so that the instruction could in effect be "coercive" upon the minority view. Romine v. State, 256 Ga. at 527. The state appellate court further noted, however, that unless a trial court must declare a mistrial, and the court noted that it had just previously held to the contrary, "then some supplemental instructions concerning further deliberations are desireable, perhaps even necessary." Romine v. State, 256 Ga. at 527. The state appellate court then reviewed a commentary to Rule 15-4.4(b) of the A.B.A. Standards for Criminal Justice, noting that while the A.B.A. view was that an Allen charge should not be used, it was appropriate for a trial court to give or repeat an instruction to the jury regarding its responsibilities in deliberating where the instruction addressed five points: (1) that in order to return a verdict, each juror must agree to the verdict; (2) that jurors had a duty to consult with each other and to deliberate with a view towards reaching an agreement, if possible; (3) that each juror must decide the case him or herself but should endeavor to consider the evidence in an

impartial light; (4) that during deliberations, a juror should not hesitate to re-examine his or her view and change an opinion if the juror concluded the opinion was erroneous; and (5) no juror should surrender an honest conviction solely because of the views of other jurors. Romine v. State, 256 Ga. at 527. The state appellate court concluded that the "supplemental instructions" given in the instant case were consistent with the five aforementioned points. Romine v. State, 256 Ga. at 527. The court further noted that the supplemental instructions here "did not single out jurors in the minority as being the only ones who might reasonably be asked to re-examine their views, or erroneously imply that a mistrial would result in a retrial." Romine v. State, 256 Ga. at 527_. The state appellate court concluded, "The supplemental instructions given here were fair and accurate." Id. The court concluded that the trial court did not abuse its discretion in giving the supplemental instructions. Id.

Respondent submits that a review of the decision of the court below shows that the court determined the issues of the propriety of the supplemental instructions as well as whether or not the instructions were erroneous in this case upon an independent and adequate state ground and, thus, did not reach any federal constitutional question. Thus, Respondent would urge this Court to decline to review the federal constitutional issues raised by Petitioner in the instant petition as these issues were not reached below.

II. AS THE PROPRIETY OF THE SENTENCING CHARGE WAS DECIDED BY THE COURT BELOW UPON AN INDEPENDENT AND ADEQUATE STATE GROUND, THIS COURT SHOULD DECLINE TO CONSIDER PETITIONER'S FEDERAL CONSTITUTIONAL QUESTIONS.

In the second issue presented to this Court for review, Petitioner contends that a portion of the trial court's charge at the resentencing phase had the effect of precluding consideration by the jury of allegedly mitigating evidence. Petitioner contends that the effect of these instructions resulted in an Eighth and Fourteenth Amendment violation. A review of the state court decision, however, shows that the state appellate court decided this allegation upon an independent and adequate state ground.

A review of the record in this case shows that the state appellate court noted that Petitioner's complaints centered around the court's instruction to the jury regarding the limited purpose of evidence introduced regarding prior difficulties between Petitioner and his parents. Specifically, the charge complained of is as follows:

> I further charge you that evidence of prior difficulties between the Defendant and the alleged victims has been admitted for your consideration solely and only for the purpose of its illustrating, if it does so illustrate, the state of feeling between the Defendant and the alleged victims, and the bent of mind, and course of conduct on the part of the accused. Now, this evidence is admitted for your consideration only as it may illustrate such matters, and for no other purpose. Whether or not this evidence illustrates such is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose.

(T. 2874-75). The state appellate court reviewed this claim of error arising from this charge, as well as two other claims of Petitioner regarding the trial court's instruction on voluntary intoxication, which is not a defense to any crime under Georgia law, as well as a charge that episodic amnesia is not a defense to a crime under Georgia law, to conclude that the charge as a whole did not limit the jury's consideration of mitigating circumstances. Romine v. State, 256 Ga. at 528. In this case, the court noted as follows:

> As we have noted previously, evidence relating to guilt or innocence is relevant to sentence. See Cook v. State, 255 Ga. 565, 586 (n. 11) (340 SE2d 891) (1986); Alderman v. State, 254 Ga. 206, 210(8) (327 SE2d 168) (1985); Blankenship v. State, 251 Ga. 621 (308 SE2d 369) (1983). It may have particular importance where, as here, the case is being retried as to sentence and the jury is hearing for the first time, at the sentencing phase of the trial, evidence relating to the circumstances of the offense. In this case, moreover, the statutory aggravating circumstances contended by the state were some of the circumstances of the offense, and thus, notwithstanding Romine's conviction on two counts of murder and one count of armed robbery, the state was required to prove beyond a reasonable doubt that one count of murder was committed while the defendant was engaged in the commission of the other murder, and that the other count of murder was committed while the offender was engaged in the commission of the offense of armed robbery. OCGA § 17-10-30(b)(2) and (c).

Romine v. State, 256 Ga. at 528.

The state appellate court noted that at this resentencing trial, Petitioner "vigorously denied" committing these offenses. Romine v. State, 256 at 528. Petitioner contended at his resentencing trial that he had been drugged by his girlfriend so that he was only marginally aware of what he was doing when the crimes were committed, that his girlfriend was the actual murderer, and that he had confessed prior to the original trial in this case partially because of drug-induced hallucinations and partially out of a desire to protect his girlfriend. Romine v. State, supra. The state appellate court held:

> Because this was a retrial as to sentence in which the defendant disputed his guilt, the court was required to include in its instructions matters that ordinarily would have been covered in the charge at the guilt-innocence phase of the trial, including credibility of witnesses, expert testimony, definitions of the crimes charged, and theories of criminal liability.

Romine v. State, supra.

The state appellate court found that "the jury could not reasonably have concluded from the charge as a whole the defendant's prior difficulties with his parents could not be considered in mitigation." Romine v. State, 256 Ga. at 529. The state appellate court cited other portions of the trial court's charge on mitigating circumstances, including language which stated that "a jury must be allowed to consider on the basis of all relative [sic] evidence, not only why a death sentence should be imposed, but also why it should not be imposed. The jury should consider as a mitigating factor any of the circumstances of the offense that the Defendant proffers

as a basis for a sentence less than death." Romine v. State, 256 Ga. at 529. The state appellate court further noted that the jury was specifically told that the jury could impose a life sentence, notwithstanding the fact the jury might find the existence of statutory aggravating circumstances. Id. The jury was also told that the jury could impose a life sentence based upon any mitigating or extenuating facts or for any reason or no reason, whether or not the jury found the existence of any mitigating circumstances in this case. Id. The jury was further instructed, "I charge you that the jury is empowered to consider as mitigating anything they find to be mitigating without limitation or definition. I further charge you that the jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the Court." Romine v. State, 256 Ga. The state appellate court concluded as follows:

> The court's instructions on mitigating circumstances--which are even more extensive than we set forth above, and which, at the jury's request, were repeated in full midway through the jury's deliberations--are sufficiently clear, comprehensive and complete to dispel any reasonable possibility that the jury felt at all restricted in its consideration of mitigating circumstances.

Romine v. State, 256 Ga. at 530.

The record in the court below shows that the state appellate court reviewed this claim of error solely under state law and did not reach any federal constitutional question. Accordingly, as the decision of the court below rest upon an independent and adequate state ground, Respondent would urge this Court to decline to review this issue.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the decision of the court below sought to be reviewed rests upon an independent and adequate state ground.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAULA K. SMITH, attorney of record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day timely served a true and correct copy of this brief in opposition for Respondent by depositing a copy of same in the United States mail, with sufficient postage fixed thereon and addressed to:

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This 20th day of March, 1987.

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